No. 81644

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of

DAVID W. McCUISTION

BRIEF OF AMICUS CURIAE KING COUNTY PROSECUTING ATTORNEY DANIEL T. SATTERBERG

David J. Hackett
Donald Porter
Attorneys for Amicus Curiae
King County Prosecuting Attorney

W554 King County Courthouse
Seattle, Washington 98104
(206) 205-0580

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

In the seminal case of *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), this court approved Washington's *indefinite* civil commitment law for sexually violent predators. Although *claiming* that it does nothing more than "allow a jury to decide whether the committed individual remains an SVP," in reality, the current 5-4 majority effectively dismantles *indefinite* civil commitment in Washington and makes the SVP law unaffordable, even in the best budgetary times, through use of a constitutional doctrine that places the matter largely "outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). By creating a substantive right to a new trial anytime a SVP is able to present expert testimony that conflicts with the existing indefinite commitment, the majority effectively enables SVPs to obtain expensive annual recommitment trials for the price of an expert report, which is paid for at public expense. Amicus King County Prosecuting Attorney Daniel T. Satterberg respectfully asks this court to reconsider its decision using a procedural due process analysis that allows for consideration of competing state interests, rather than adhering to a majority decision which creates a substantive due process right and thwarts valid legislative efforts to promote treatment and community safety.

II. THE MAJORITY MISANALYZES THE CASE BY USING SUBSTANTIVE DUE PROCESS, RATHER THAN PROCEDURAL DUE PROCESS

The majority decides the current case on broad substantive due process grounds. For reasons explained in the State's motion for reconsideration, the majority undertakes this analysis despite the lack of a "carefully described" fundamental right to obtain a new trial from an indefinite commitment due to conflicting expert opinion. *See Glucksberg*, 521 U.S. at 720. As a result, the majority assumes a fundamental right that is not well grounded in our nation's history and legal traditions -- a right to a new trial based solely on the opinion of a defense-hired expert.

The difference between a substantive and procedural analysis is crucial in this case. By declaring a substantive right, the majority eliminates any discussion or analysis of Washington's need to effectively deal with the problems posed by sexually violent predators. Once a substantive right is "created by the Constitution . . . no amount of process can justify its infringement." *McKinney v. Pate,* 20 F.3d 1550, 1557 (11th Cir.1994) (*en banc*). Because this court has invoked a right based in substantive due process, important legislative solutions meant to address societal problem are foreclosed "regardless of the procedures used to

implement them."[1] *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

In contrast, procedural due process allows for a more flexible approach that appropriately balances private and societal interests. *See generally Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Three factors help define the procedure that is "due:"

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. 893.

Here, the question before the court was entirely procedural. Although McCuistion claimed that the 2005 amendments in RCW

---

[1] Judicial restraint is an important aspect of Separation of Powers. By using the disfavored constitutional doctrine of substantive due process to declare a law unconstitutional on a bare 5-4 vote, the members of the majority fail to exercise appropriate restraint or deference to sound legislative judgment. The doctrinal overreach of the majority is all the more striking given that the crucial fifth vote is accompanied by a broad concurrence that would entirely preclude SVP civil commitment despite the overwhelming weight of authority. *See In re McCuistion*, ___ Wn.2d ___ (2010) (Sanders, J. Concurring).

71.09.090 would result in his continued commitment absent any evidence of a mental condition and dangerousness, this argument cannot be taken seriously. Under the express terms of RCW 71.09.070, the Department of Social and Health Services is mandated to annual review "whether the committed person currently meets the definition of a sexually violent predator." The commitment criteria is considered by the annual review without any reference to the gate keeping provisions of RCW 71,09,090(4), which are expressly limited to a show cause hearing. If DSHS determines that a person no longer meets civil commitment criteria, the statute provides adequate mechanisms for a new trial under RCW 71.09.090(1) and (3). Under this statutory framework, the narrow substantive due process problem identified in *Foucha v. Louisiana*, 504 U.S. 71 (1992) -- continued civil commitment of "sane insanity acquittees in psychiatric facilities" -- cannot happen.

Rather than expanding *Foucha* beyond its facts to effectively eliminate indefinite civil commitment, this court should have focused on the following procedural due process question: "When a person has been indefinitely committed by a unanimous jury beyond a reasonable doubt, what review procedures are necessary to sustain the commitment?" This is a pure *Mathews* procedural question and requires a studied consideration of our state's interests in fashioning a civil commitment review scheme that is targeted for the unique challenges presented by sexually violent

predators.

The primary legislative concerns in adopting the 2005 amendments are set forth in the detailed legislative finding that accompanied the amendment. The Legislature rejected the approach that has been reinstated by the current majority opinion because it "subverts the statutory focus on treatment and reduces community safety by removing all incentive for successful treatment participation . . ." Laws of 2005, Ch. 344 sec.1 Rather than allowing RCW 71.09.090 to be used as an additional pathway to collaterally attack an indefinite commitment, the Legislature clearly indicated that annual reviews were not the proper forum to claim new evidence. *Id.* These legislative findings are unassailable under a procedural due process analysis, which makes the majority's decision to create a fundamental right invalidating the statute all the more concerning.

Without the indefinite commitment term that is necessary to encourage treatment and address the "very long term" needs of the SVP population, *id.*, the majority's decision places the continued viability of RCW 71.09 at substantial risk. The majority's assertion that "the most the doctor's testimony can do in this situation is to allow a jury to decide whether the committed individual remains an SVP" disregards the practical importance of the gate-keeping function of the show cause proceeding. The dissent correctly foresees the economic burden that will

be borne by state taxpayers as a result of the majority opinion. "If McCuistion prevailed in his position, the costs and administrative burdens that would arise would also be unacceptably high." Dissent at 8. Indeed, the easy and not-so-cheap retrials facilitated by the majority opinion represent a substantial cost to Washington that impacts the very viability of the SVP commitment law.

Under the 2005 amendments, recommitment trials in King County were appropriately limited to situations where a civilly committed sexually violent predator was able to demonstrate a real change in his condition. There are currently 77 persons under an order of commitment as a result of SVP petitions filed in King County Superior Court. The persons recommended for civil commitment represent the "worst of the worst" sex offenders -- just over 1% of the total sex offenders who release from prison in any given year.

Since the amendments became effective in 2005 and despite the "worst of the worst" focus of the SVP law, the DSHS annual review report has determined in six separate King County cases that the person no longer meets criteria for civil commitment. Under RCW 71.09.070, DSHS evaluators have applied the statutory SVP criteria to ensure that a person continues to meet criteria for indefinite commitment without regard to the limitations in the 2005 amendments. Release to a less restrictive alternative was recommended by the DSHS annual review in another

seven cases. In short, the civil commitment system is working well to screen persons who no longer meet SVP criteria and does not merit the majority's broad intervention through the doctrine of substantive due process.

Whereas the 2005 amendments provided an effective gate keeping mechanism that encouraged treatment by promoting a change in condition, the majority decision opens the proverbial floodgates. There are a number of defense experts who are well-documented in the appellate case law and willing to provide a paid opinion expressing their disagreement with SVP civil commitment. By eliminating the gate keeping provisions of the 2005 amendments, the majority leaves no certain way to effectively limit recommitment trials to individuals who demonstrate a change in condition. Indeed, in the short time since *McCuistion* was issued, SVP respondent's have obtained one new trial without regard to treatment, and filed three motions for discretionary review where treatment did not support a recommitment proceeding.

The majority's suggestion that it is not burdensome or expensive to hold a new trial revisiting an indefinite civil commitment misses the mark. It is not a simple affair to recommit a sexually violent predator. A jury trial in a SVP case typically lasts about three weeks, including pretrial motions and *voir dire*.

A recent case, *In re the Detention of Gordon Strauss*, King County

Superior Court Cause No. 02-2-08003-1, illustrates the costs typical of a recommitment trial. Strauss was tried before a King County jury in 2009. Because he was indigent, Strauss's legal expenses were covered by Washington tax payers. In his case, total pre- and post-trial defense costs were $249,710.45, including $132, 209.84 for defense attorneys and their paralegals, $86, 879.42 for defense expert witnesses, $9,168.40 for investigation expenses, and $7,107.30 for miscellaneous costs. In addition to these defense costs, the King County Superior Court incurred costs in the amount $19,714.80 for Strauss's three-week jury trial. The costs to the prosecution were also substantial, totaling approximately $46,141.91 for an expert witness and substantial amounts for attorney time. Overall, Strauss's recommitment trial easily cost taxpayers in excess of $400,000.

Given that there are 77 committed SVPs from King County alone, affording all of these SVPs an annual jury trial would cost state taxpayers tens of millions of dollars per year. If only half of the King County cases requested and obtained a new recommitment trial, this would represent an annual state expense of $15.4 million. This is a substantial burden on the state. By creating a substantive right to a new trial based on the bare presentation of conflicting expert opinion, the majority has left Washington without a cost-effective means of vindicating its compelling interests for community safety and treatment.

The majority's claim that these expenses can be avoided through

application of the *Frye* doctrine ignores this court's own precedent. In a series of decisions, this Court has repeatedly held that the opinion of a qualified expert witness on the future dangerousness of an alleged SVP -- whether it is based on clinical judgment or actuarial assessment -- is not subject to the *Frye* standard. *Young*, 122 Wash.2d at 56-57; *In re Thorell*, 149 Wash.2d 724, 754-55, 72 P.3d 708 (2003); *In re Campbell*, 139 Wash.2d 341, 986 P.2d 771 (1999). Exclusion of expert testimony would be error under these decisions. *See also In re Anderson* 166 Wash.2d 543, 551, 211 P.3d 994, 997 (2009) (reversing commitment for exclusion of untimely defense expert).

This court should reconsider the majority decision and find the 2005 amendments constitutional. The majority's decision establishes a dangerous substantive due process precedent by subjecting the review portions of a duly enacted statute to strict scrutiny and narrow tailoring simply because the overall statutory scheme "impairs a fundamental right to liberty." Many statutes, including all criminal statutes, broadly impair liberty, but this should not provide a license for courts to second-guess legislative decision making under the guise of substantive due process, nor should it impose an obligation on the Legislature to narrowly tailor statutory solutions to just barely cover identified societal problems, and no more. Because substantive due process provides too much of an unguided opportunity to "rewrite" laws to judicial liking, this court should

reconsider and reject the expansive understanding of substantive due process that is contained in the current majority decision. *See*, *e.g.*, *Andersen v. King County*, 158 Wn.2d 1, 68-69, 138 P.2d 963 (2006) (Johnson, J.M. concurring)(recounting doctrinal dangers of substantive due process).

III. CONCLUSION

For the forgoing reasons, amicus King County Prosecuting Attorney Daniel T. Satterberg respectfully requests that the court reconsider its decision in the above case. The 2005 amendments to RCW 71.09 should be approved and the Court of Appeals should be affirmed.

DATED this 29th day of September, 2010.

David J. Hackett, WSBA #21236
Donald Porter, WSBA #20164
Attorney for Amicus Curiae
Washington Association of Prosecuting Attorneys